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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 426

INTERCOUNTY OPERATING CORPORATION AND SALONGA FARMS, INC.,

Petitioners,

vs.

COUNTY OF NASSAU

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

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Petitioners,

vs.

COUNTY OF NASSAU

PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, above named, respectfully show:

This is a petition for a writ of certiorari to review a final decision made June 14, 1945, by the Court of Appeals, the last resort of all causes of the State of New York, affirming, without opinion, an order of the Appellate Division of the Supreme Court, Second Department, which order modified, and as modified, affirmed the order of the County Court of the County of Nassau granting the motion of the plaintiff for summary judgment, and the judgment entered thereon.

1. Summary Statement

This action to establish the regularity of a sale for unpaid taxes and to clear title under the Treasurer's deeds issued thereon was brought pursuant to the Nassau County Administrative Code (Chapter 272, Laws of New York, 1939), hereinafter referred to as the "Code", as amended by Chapters 562 and 679, Laws of New York, 1941 hereinafter referred to as the "Code Amendments". Pertinent provisions are set out in the Appendix hereto.

Your Petitioners, at sales held on July 14th, 1939, and again on July 10th, 1940, purchased from the County Treasurer, pursuant to the provisions of the Code, certificates of sale of the lien of the County for unpaid taxes, assessed and levied for the tax year 1938-39 and the tax year 1939-40, investing therein approximately $250,000.00. Under the Code,

(1) Petitioners could not obtain a conveyance of the premises described in their tax sale certificates before the expiration of 4 years from the date of the sale, within which period the owner or other person having a lien on said premises could redeem from such sale to the Petitioners (Secs. 5-50.0 and 5-51.0, Appendix, Pages 30, 21).

(2) After 4 years from each such tax sale, Petitioners would become entitled to the amounts paid for such certificates, plus interest, penalties and costs (Sec. 5-48.0, Appendix, Page 30).

(3) If after the expiration of the period of 4 years, no redemption had been made, Petitioners would become entitled to possession of the real estate affected by the tax lien and to a conveyance thereof which "shall vest in the grantee an absolute estate in fee, subject to all claims which the County may have thereon for tax

or other liens or encumbrances'' (Secs. 5-52.0 and 5-53.0, Appendix, Page 32).

Thereafter, and pursuant to the Code Amendments, subsequently enacted (effective April 19th and 22nd, 1941), the County of Nassau, Respondent, in July of 1941, purchased subsequently accruing tax liens covering the properties affected by the liens theretofore sold to the Petitioners. Under the Code Amendments,

(1) the time allowed for redemption from a sale thereunder, by the owner or any other person having a lien on the premises was reduced to 2 years, instead of the 4 years under the Code.

(2) the new purchaser thereby would become entitled to a deed at a time before a purchaser at a prior sale of the same property, if any (as is the case involving the Petitioners), could exercise his right to acquire a deed.

(3) However, the rights of prior purchasers at sales held before the effective date of the Code Amendments which affect the same property subsequently sold were to continue as if the Code Amendments had not been enacted (Chapter 679, Laws 1941, Appendix, Pages 25 to 28.)

Promptly within two years after the sale to the County and before the Petitioners could become entitled to a conveyance of the premises under the Code, and no redemption by the owner having been made, the County gave notice calling upon Petitioners to redeem, under the Code Amendments, from such sale to the County. By said notice the County required the Petitioners to pay the amounts paid by the County for its certificates, plus interest, penalties and costs, on threat of having their rights under their tax sale

certificates extinguished, by the County obtaining from the County Treasurer, deeds running to the County, respecting the properties described in the certificates held by Petitioners.

Petitioners resisted the demand thus made upon them on the ground that the assumption of such additional burden prior to their right to a deed was not contemplated by the terms of their contract, that their rights under their contracts were specifically saved by a provision of the Code Amendments, and that, as sought to be construed and applied by the County, as tax sale purchaser, the Code Amendments abrogated the contractual rights of the Petitioners in violation of the federal Constitution.

Seeking a declaration of the rights of the parties concerned Petitioners thereupon brought an action in the Supreme Court of the State of New York for a declaratory judgment and for a construction of the statutes involved. The County, as defendant in that action (*Intercounty Operating Corporation and Salonga Farms, Inc.* v. *The County of Nassau*), moved for a dismissal of the complaint upon the ground that there being no present or justiciable controversy, the complaint failed to state a cause of action for the remedy of a declaratory judgment. Petitioners' complaint in said action was dismissed at Special Term (181 Misc. (N. Y.) 390), and the dismissal was affirmed by the Appellate Division (267 A. D. (N. Y.) 957), granting leave, however, for an appeal to the Court of Appeals. The Court of Appeals affirmed, without opinion (293 N.Y. 688). A petition for a writ of certiorari to this Court was denied (October Term, 1944, Docket No. 443).

While the above litigation was in progress, the County, Respondent, applied for and obtained from the County Treasurer, a series of deeds of the properties affected by its certificates, and recorded the same.

The County, Respondent, then brought this action in the County Court of Nassau County to clear title under its deeds. Petitioners duly defended and set up as and for a separate and distinct defense that Section 6 of Chapter 679, Laws of New York, 1941 (Appendix Page 28), specifically saved the rights of the Petitioners for the enforcement of their tax sale certificates, as provided by the Code prior to the Code Amendments (R. 16), and that the Code Amendments, insofar as they be permitted to infringe upon any of the rights acquired by the petitioners or to impose additional burdens not existing at the time of the purchase of their tax liens, are void and unconstitutional and within the prohibition of the federal Constitution, as impairments of their contracts with the County Treasurer (R. 17). Respondent moved to strike out the answer and said motion was granted. Judgment was thereupon entered, decreeing that the Respondent, County, is the lawful owner of the premises described in its deeds, and barring your Petitioners from any claim, lien or encumbrance upon the said property (R. 4 to 5).

On appeal from said judgment to the Appellate Division, your Petitioners urged and in their brief argued that the failure to preserve their liens by giving effect to Section 6 of the Code Amendments was repugnant to the federal Constitution as impairing the obligation of their contracts. The order and judgment were affirmed by the Appellate Division, after modification as to costs, one justice dissenting, however, and voting for reversal, on the ground that Petitioners held a prior lien, granting a right to conveyance which was preserved by the saving clause in the amendatory statute (R. 24).

The federal question was also argued in the Court of Appeals, which Court again affirmed without opinion. By order dated July 19, 1945, the Court of Appeals denied your Petitioners' motion to recall and amend the Remit-

titur for the purpose of showing that questions under the Constitution of the United States had been presented and necessarily passed upon by the Court of Appeals in its determination of this case.

The order of the Court of Appeals in this cause was a final determination of a present, justiciable controversy. It is from this decision which construes subsequent legislation so as to impair substantial rights under subsisting contracts that Petitioners come praying for a Writ of Certiorari.

2. Jurisdiction

The date of the decision of the Court of Appeals of the State of New York of which review is here sought, is June 14th, 1945 (R. 25) and the final decree of that Court was filed June 29, 1945 (R. 25).

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 (b) of the Judicial Code, as amended by the Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54, 28 U. S. C. A. Section 344 (b).

There are here involved Laws of New York, 1939, Chapter 272 and amendments thereto by Laws of New York, 1941, Chapters 562 and 679, and the Court of Appeals of the State of New York by its construction and application of the later enactments has decided against Petitioners' rights thereunder so as to produce an impairment of Petitioners' contracts repugnant to Article 1, Section 10, of the Constitution of the United States. The pertinent provisions of the statutes involved are set forth at length in the Appendix hereto, pages 24 to 34.

The federal question was raised by the pleadings (R. 16 to 18, and was stressed in the briefs and on the arguments in all courts. The decision of the Court of Appeals could not have been rendered without deciding the consti-

tutional questions thus raised by Petitioners and argued before that Court.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States.

Detroit United Ry. v. *Detroit*, 242 U. S. 238;
Milsaps College v. *City of Jackson*, 275 U. S. 129;
Columbia Water Power Co. v. *Columbia Electric St. R. etc. Co.*, 172 U. S. 475;
McCullough v. *Virginia*, 172 U. S. 102, 116, 119.

3. Reasons for Issuance of Writ

The determination of the Court of Appeals of the State of New York, by affirming without opinion the order of the County Court, has decided an important question of law affecting the property and vested property rights of your Petitioners and has thereby created a rule of law repugnant to and violative of the applicable provisions of the Constitution of the United States and is contrary to decisions of this Honorable Court, in the manner following:

1. It amounts to a deprivation of rights under a contract solemnly authorized by a prior act of the State Legislature in contravention of the expressed intent contained in a subsequent act of the said Legislature to save and preserve those rights previously created.

2. It not only impairs, in the ordinary sense, but, in its application, completely and arbitrarily extinguishes previously created and subsisting contractual rights of great solemnity, in order to give effect to rights subsequently created.

3. It deprives the Petitioners of equal protection under the law by granting to the Respondent, County of Nassau, and denying to the Petitioners the relief which ought and should operate in favor of the latter, the same having been

preserved to the Petitioners by the express provision of the amendatory act.

4. It declares a rule of law producing by an unnecessarily harsh and oppressive application of subsequent legislation, substantial impairment of contracts, aggregating in value upwards of $250,000.00 which were solemnly entered into on the faith of prior valid legislative authority and sanction.

5. It declares a rule of law contrary to the decisions of the Supremee Court of the United States, without indulging in an expression, by affirming without opinion, of the basis upon which such rule is predicated, thereby creating doubt and confusion as to its soundness in purview of the federal constitutional prohibition.

6. Insofar as the decision of the State Court interprets subsequent legislation so as to impair rights under existing contracts, it is not in accord with the decisions of this Court in the following cases among others:

Wood v. *Lovett*, 313 U. S. 362;
Columbia College v. *City of Jackson*, 275 U. S. 129;
Bradley v. *Lightcap*, 95 U. S. 1;
Walker v. *Whitehead*, 83 U. S. 357.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of New York, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of the proceedings of the said Court of Appeals, and that the order and judgment of the Court of Appeals of the State of New York be reversed

by this Honorable Court, and that your Petitioners have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated, New York, September 14, 1945.

INTERCOUNTY OPERATING CORPORATION,
and
SALONGA FARMS, INC.,
Petitioners,

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